No. 96-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JUAN PEDRO SOTO, *et al.*, and
RAFAEL RIVERA FERNANDEZ, *et al.*,
Conditional Cross-Petitioners

v.

CARLOS CHARDON, *et al.*, *Cross-Respondents*.

On Conditional Cross-Petition For Writ Of Certiorari
To The United States Court Of Appeals For The First Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

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JUAN FUMERO SOTO, *et al.*, and
RAFAEL RIVERA FERNANDEZ, *et al.*,
Conditional Cross-Petitioners,

v.

CARLOS CHARDON, *et al.*, *Cross-Respondents.*

On Conditional Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to Rule 22 of this Court's Rules, cross-respondents[1] submit this Brief in Opposition to Cross-Petitioners' Conditional Cross-Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

In its opinion of June 8, 1982, the court below addressed cross-petitioners' argument that this Court's decision in *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), as applied in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981),

[1] Cross-respondents herein are petitioners for a writ of certiorari in No. 82-271. Cross-petitioners herein seek a writ of certiorari only if the Court grants the petition in No. 82-271.

should not be applied retroactively in these cases.[2] Appendix to Petition for Certiorari, 18a-23a.[3] After carefully considering the test established by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the court below concluded:

> "We cannot say that *Ricks* established a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression."
>
> * * *
>
> "Moreover, given the at best unsettled state of the law on accrual before *Ricks*, retroactive application would not disrupt expectations of either party. There would also seem to be little impact on the administration of justice whether or not *Ricks* is applied retroactively. The second test of *Chevron Oil* thus does not require non-retroactivity."
>
> * * *
>
> "The expenditure of time and energy in the *Fumero Soto* case is regrettable, but the limitations problem had been recognized before the case was tried on its merits. We are unpersuaded that equity requires *Ricks* to be applied prospectively only, and we hold *Ricks* applies retroactively." Appendix to Petition for Certiorari, 21a, 22a, 22a-23a.

The court below correctly applied the *Chevron Oil* test, and its decision is consistent with decisions of other federal courts as well. Accordingly, the Conditional Cross-Petition should be denied.

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[2] The decision of the court below, not reported at the time the Petition for Writ Certiorari in No. 82-271 was filed, now appears at 681 F.2d 42 (1st Cir. 1982).

[3] All references to the "Petition for Certiorari" refer to the Petition filed in No. 82-271.

I. The Thirty-Six *Fernandez* Cross-Petitioners Are Barred From Review By A Previous Decision Of This Court.

Thirty-six of the cross-petitioners herein were previously before this Court as respondents in *Chardon* v. *Fernandez*, 454 U.S. 6 (1981) (per curiam). In that case, this Court applied *Ricks* and held that their causes of action accrued on the dates they were notified that they were not being reappointed to their temporary administrative positions for the 1977-78 school year, not on the later dates when the non-reappointment decisions took effect. 454 U.S. at 8. Therefore, this Court has already applied its decision in *Ricks* to the thirty-six *Fernandez* cross-petitioners and the issue is closed as to them.[4]

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[4] In *Chardon* v. *Fernandez*, *supra*, respondents (the thirty-six *Fernandez* cross-petitioners herein) petitioned this Court for rehearing, advancing almost verbatim the non-retroactivity argument made in the instant Cross-Petition. The Petition for Rehearing was denied, ___ U.S. ___, 102 S. Ct. 1042 (1982). Cross-Petitioners now assert that, "this denial has no conclusive effect on any of [them], including the *Fernandez* [cross-petitioners]," because of the ruling of the court below that "surely the denial of a petition for rehearing can have no greater precedential effect than the denial of a petition for certiorari, which is to say none." Cross-Petition at p. 5 n. 1 (citations omitted). Cross-Petitioners' argument, however, is misleading. The quoted language from the First Circuit's opinion was made in reference to the non-retroactivity argument advanced by the fifty-five *Fumero Soto* cross-petitioners. *See* Appendix to Petition for Certiorari, 18a-19a. There can be no serious question that this Court's decision in *Chardon* v. *Fernandez* precludes the review on retroactivity sought by the *Fernandez* cross-petitioners here.

II. Cross-Petitioners' Arguments Fail to Satisfy The Standards Which Must Be Met To Justify Non-Retroactivity.

In support of their argument that the court below erred in failing to apply this Court's decision in *Ricks* prospectively only, cross-petitioners rely on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). They assert that the three-part non-retroactivity test established in *Chevron Oil* was not correctly understood or applied by the First Circuit. The care and thoroughness of the analysis of the retroactivity issue by the court below belies this assertion. Moreover, review of the applicable law shows cross-petitioners' reliance on *Chevron Oil* to be misplaced.[5]

A.

In *Chevron Oil* this Court identified three separate factors to be considered in addressing non-retroactivity. As to the first:

> "[T]he decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression

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[5] It is a well-established rule that appellate courts must rule in accordance with the law in effect at the time of their decision. *See, e.g., Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486 n. 16 (1981); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 281 (1969); *Johnson* v. *Lehman*, 679 F.2d 918, 920 (D.C. Cir. 1982). As the court below noted recently, "it is normal practice for rules of decision in cases to be applied retroactively." *Miro Martinez* v. *Compania Trasatlantica Espanola, S.A.*, 643 F.2d 897, 899 (1st Cir. 1981). In light of these principles, the burden of persuasion on cross-petitioners in arguing for non-retroactivity is necessarily a heavy one. They did not meet this burden below, and have not met it here.

whose resolution was not clearly foreshadowed." 404 U.S. at 106 (citations omitted).

As the court below correctly noted, "the weight of authority [on the accrual issue] is far less than plaintiffs suggest." Appendix to Petition for Certiorari, 20a. Indeed, as the court pointed out, only two of the cases cited by cross-petitioners are factually analogous to the instant cases. In *Bireline* v. *Seagondollar*, 567 F.2d 260 (4th Cir. 1977), *cert. denied*, 444 U.S. 842 (1979), the Fourth Circuit held that a college professor's cause of action under Section 1983 for an allegedly discriminatory discharge accrued on the date she was notified of termination—a ruling correctly cited by the court below as entirely consistent with this Court's later decision in *Ricks*. In *Egelston* v. *State University College at Geneseo*, 535 F.2d 752 (2d Cir. 1976), the Second Circuit ruled that a college professor's Title VII action for gender discrimination, including discharge, accrued when her discharge was consummated and not on the earlier date when she received notice of termination.[6] In light of the contrasting results of the only two factually similar cases, the lack of uniformity in the holdings in other cases cited below by cross-petitioners (*See* Appendix to Petition for Certiorari, 20a-21a), and the absence of any prior decision by the First Circuit involving this or similar issues, cross-

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[6] Even the *Egelston* case does not squarely support the position of cross-petitioners, since the plaintiff in that case alleged a number of discriminatory acts, some of which were continuing in nature and thus victimized her until the day she stopped working. 535 F.2d at 754-55. In this regard, *see also Rubin* v. *O'Koren*, 644 F.2d 1023 (5th Cir. 1981), where on rehearing after *Ricks* was decided by this Court, it was distinguished by the Court of Appeals on the ground that the plaintiff's complaint alleged numerous discriminatory acts, some of which occurred after the date of notice of termination.

petitioners fall far short of demonstrating that *Ricks* overruled clear past precedent prevailing at the time cross-petitioners' suits were filed.[7]

Furthermore, cross-petitioners reach too far in their assertion that "*Ricks* was a case of first impression in this Court . . . whose resolution was not clearly foreshadowed." Conditional Cross-Petition at p. 8. Indeed, in *Ricks*, this Court cited its decision in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), as support for the propositions that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination," 449 U.S. at 257, and that "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts become most painful." 449 U.S. at 258 (citation omitted). Thus, not only did *Ricks* not overrule clear past precedent, but the decision itself was foreshadowed by this Court's earlier decision in *United Airlines*. Cross-Petitioners' argument thus fails under the first *Chevron Oil* factor.[8]

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[7] This is in marked contrast to the *Chevron Oil* case. There this Court noted that its decision in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), which it determined should not be applied retroactively, "effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit . . . [which] [w]hen the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings . . . represented the law governing his case." 404 U.S. at 107 (citations omitted).

[8] This Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, ___ U.S. ___, 102 S. Ct. 2858 (1982), cited in the Cross-Petition at p. 11, does not suggest a different conclusion. That case presented "an unprecedented question of interpretation of Article III," 102 S. Ct. at 2880, thus justifying non-retroactive application of the decision therein. No such situation is presented here.

B.

As to the second factor, this Court in *Chevron Oil* stated:

> "[W]e must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its application." 404 U.S. at 106-07 (citation omitted).

The court below, in considering this second factor, concluded as follows:

> "Retroactive application of *Ricks* would give greater protection to defendants' repose without unduly limiting plaintiffs' ability to sue. Moreover, given the at best unsettled state of the law on accrual before *Ricks*, retroactive application would not disrupt expectations of either party. There would also seem to be little impact on the administration of justice whether or not *Ricks* is applied retroactively. The second test of *Chevron Oil* thus does not require non-retroactivity." Appendix to Petition for Certiorari, 22a.

This conclusion is manifestly correct. The *Ricks* decision is entirely consistent with this Court's previous decisions stressing the importance of the policy of repose embodied in statutes of limitations. *See Board of Regents* v. *Tomanio*, 446 U.S. 478, 487-89 (1980); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 554-55 (1974); *Burnett* v. *New York Central Railroad Co.*, 380 U.S. 424, 428 (1965); *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Moreover, as noted earlier, no clear or prevailing body of past precedent contrary to the *Ricks* rule existed which would have justified reliance by cross-petitioners on some other

approach. Thus, under the second *Chevron Oil* factor, cross-petitioners' arguments also fail.[9]

C.

In *Chevron Oil* this Court concluded as follows:

> "Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice and hardship' by a holding of non-retroactivity.' " 404 U.S. at 107 (citation omitted).

The conclusions of the court below clearly refute cross-petitioners' assertions of "substantial inequitable results" due to the application of *Ricks*.

> "Neither group of plaintiffs advance any reason . . . as to why they waited so long before filing suit, thereby risking a time bar if the date of notice of demotion were to become the accrual date. . . . The expenditure of time and energy in the *Fumero Soto* case is regrettable, but the limitations problem had

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[9] Cross-petitioners rely on language from the *Chevron Oil* decision which they claim demonstrates that analysis under the second *Chevron Oil* factor favors them. The cases, however, are very different. In *Rodrigue* v. *Aetna Casualty & Surety Co.*, *supra*, the Court's decision was meant to benefit plaintiffs by affording them comprehensive and familiar remedies. 395 U.S. at 361, 365. The Court in *Chevron Oil* thus noted the anomaly that would result if *Rodrigue* was applied retroactively, since it would make that plaintiff's action time-barred. In this case, however, as noted by the court below, the *Ricks* rule was designed "to give greater protection to defendants' repose without unduly limiting plaintiffs' ability to sue." Thus, in the instant cases, it would be anomalous if the *Ricks* rule *did not* apply, particularly since there was no basis for justifiable reliance by cross-petitioners on any other rule.

been recognized before the case was tried on its merits." Appendix to Petition for Certiorari, 22a-23a.

As the court below correctly noted, defendants (cross-respondents herein) raised the statute of limitations as an affirmative defense in their answers to each complaint filed by cross-petitioners in the district court. Appendix to Petition for Certiorari, 12a n.5. While the district court reserved decision on this issue in the fifty-five consolidated *Fumero Soto* cases, all cross-petitioners have been confronted throughout this entire litigation with the possibility that "the one established principle . . . that a civil rights cause of action accrue[s] when plaintiff knew or had reason to know of his or her injury" (Appendix to Petition for Certiorari, 20a) could be resolved against them by the courts. Their "equitable" arguments, based on the time and money expended in the litigation in the district court, are thus unpersuasive. Obviously, if these issues had been resolved at the outset, the time and expense of this litigation would have been less for *both* sides.

Finally, in addition to the points made by the court below, another flaw exists in cross-petitioners' asserted reliance on an alleged "established rule" of accrual prior to *Ricks*. The history of this case is recounted in the Statement of the Case in the Petition for Certiorari at 3-8. It shows that the initial complaint, asserting a class action, was filed by Jose Ortiz Rivera on June 19, 1978. Class certification was denied on August 21, 1978, because the asserted class was not so numerous as to make joinder impracticable. The remaining plaintiffs (cross-petitioners herein) filed complaints on dates between January 10 and January 31, 1979. Thus, it is clear that they could not have been relying on some putative "prevailing rule in the Circuits" which was overruled by *Ricks*. Their

complaints were time-barred whether *Ricks* applied retroactively or not.[10] Cross-petitioners fail to advance any justifiable reliance or inequitable result that would justify non-retroactivity in this case.

CONCLUSION

For these reasons the Conditional Cross-Petition should be denied.

Respectfully submitted,

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[10] Only as a result of the unprecedented and novel interpretation of Puerto Rico tolling rules by the court below (review of the choice and application of which is sought by cross-respondents in their petition for certiorari in No. 82-271) have the complaints of *any* of the cross-petitioners, except Ortiz Rivera, been held to have been timely filed.